Supreme Court, U.S.
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No. 97-1344

In The

Supreme Court of the United States

October Term, 1997

MANUEL BURGO, JR.,

Petitioner,

vs.

GENERAL DYNAMICS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When interest was requested in Petitioner's Amended Complaint but not awarded by the District Court and no cross-appeal filed, did the Second Circuit Court of Appeals correctly determine that the Petitioner was not entitled to interest because of his failure to file cross-appeal.

Was the Second Circuit Court of Appeals correct in determining that payments under 33 U.S.C. § 914(f) are a penalty and not compensation, and therefore did not satisfy the provisions of 33 U.S.C. § 928 for an award of statutory attorney fees and expenses.

RULES 29.6 STATEMENT

Electric Boat Corporation (formerly General Dynamics Corporation Electric Boat Division) is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Corporation is the publicly traded corporation. Electric Boat Corporation does not issue shares to the public.

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STATEMENT OF THE CASE

The Petitioner, Manuel Burgo, Jr., filed claims with the United States Department of Labor against his employer, General Dynamics (Respondent), for work-related injuries covered under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq*. The Petitioner and Respondent reached a lump sum settlement for $140,000 which was approved by Administrative Law Judge David W. DiNardi on August 31, 1994, under 33 U.S.C. § 908(i). The LHWCA District Director formally filed the settlement Order in his office on September 13, 1994. Pursuant to 33 U.S.C. § 914(f), the Respondent must make payment within ten days after becoming due or be penalized an additional twenty percent of the compensation order. The Respondent received the Order on September 16, 1994, and mailed a check to the Petitioner's attorney on September 19, 1994. The Petitioner's attorney received the check on September 26, 1994.

The Petitioner contended that the settlement proceeds were not received within ten days after becoming due, and that he was entitled to an additional twenty percent penalty.

On October 31, 1994, the Petitioner requested the LHWCA District Director to issue a Supplemental Compensation Order awarding the additional $28,000 in penalty. The LHWCA District Director indicated that the Respondent and insurance carrier submitted "information" contesting the Supplemental Compensation Order on the theory that the ten day period provided for in § 914(f) excludes interim weekends and holidays under Fed. R. Civ. P. 6(a). However, neither the Respondent nor insurance carrier requested a hearing on the supplemental compensation claim until after the District Director conclusively ruled that the supplemental compensation was due.

On November 17, 1994, the District Director issued a Supplemental Compensation Order for a Section 14(f) penalty, awarding the Petitioner Supplemental Compensation in the amount of $28,000 on the grounds that the Respondent did not pay the settlement within ten days of it becoming due. (Petitioner's App. 1a).

Counsel for the Respondent filed a motion for reconsideration of the award order on November 23, 1994, contending that the District Director failed to calculate correctly the ten-day payment period under § 914(f), in accordance with Fed. R. Civ. P. 6(a). The Respondent also requested a hearing with the District Director on the issue of a penalty. Although the District Director denied the request for a hearing, he did consider the Respondent's argument. Nonetheless, the District Director denied the reconsideration request on December 5, 1994. The District Director based his decision on the strict interpretation of the language of § 914(f), finding that express statutory provisions prevail over Federal Rules of Civil Procedure 6(a). (Petitioner's App. 8a).

On March 29, 1995, the Petitioner filed a complaint with the United States District Court of Connecticut to enforce the Supplemental Compensation order pursuant to 33 U.S.C. § 914(f) and § 918(a). On January 31, 1996, the District Court found the complaint to be defective on its face. The Petitioner then filed with the District Court an amended petition on June 17, 1996. The amended petition asked for the sum of $28,000 due pursuant to 33 U.S.C. § 914(f), plus interest, costs and attorney's fees, if appropriate. The District Court, without a hearing, entered judgment on the Supplemental Compensation order on June 17, 1996 for $28,000, but not for any interest, costs or attorney's fees. The District Court entered a clarification of judgment *nunc pro tunc* on June 20, 1996 (Petitioner's App. 14a).

Pursuant to 33 U.S.C. § 918(a), Respondent appealed the judgment of the District Court. Petitioner did not file a cross appeal of the denial of interest, costs or attorney's fees.

On September 13, 1996, the Respondent filed a Motion for Relief from Judgment of the supplementary compensation order granted on June 18, 1996, pursuant to Fed. R. Civ. P. 60(b). The Respondent claimed that by reasons of mistake or inadvertence, the District Court's decision was not in accordance with the law. On December 24, 1996, the District Court issued an Order denying the Respondents motion for relief from judgment. (Petitioner's App. 16a).

On August 27, 1997, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court, but denied Petitioner's request for attorney's fees, expenses and interest in his successful defense of Respondents' appeal. (App. 27a). The parties filed timely Petitions for Rehearing, which were denied on November 17, 1997. (Petitioner's App. 39a).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because it does not allege an important federal question which merits review by the Supreme Court. The questions before this Court do not represent any issues of great public importance as distinguished from that of the parties. The two issues presented by the Petitioner are entitlement to interest and attorney fees.

Initially, the Petitioner requested interest when he was before the District Court. That Court did not award interest. At the time of the decision, the Petitioner did not appeal that to the Second Circuit Court of Appeals. In its order, the Second Circuit held that the issue was not before them, and refused to order

interest, as is correct under well-settled rules of law. As such, there is no ground to grant Certiorari regarding the failure to award interest.

The Petitioner further asserts that he is entitled to attorney fees due to the assignment of the § 914(f) penalty. There is no conflict between the Second Circuit Court's opinion and those of other Circuits on this issue. The Petitioner relies on the Sixth Circuit's opinion in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th. Cir) which is not similar factually with the decision in this case. In *Hisle*, the employer failed to pay the original compensation order, interest, as well as the § 914(f) penalty. Here, the question is: does the § 914(f) penalty alone satisfy the statutory language of § 928 to allow the imposition of attorney's fees?

Additionally, the published Second Circuit Court of Appeals decision in *Burgo v. General Dynamics*, 122 F.3d 140 (2d Cir. 1997), *reh. den.*, November 17, 1997, should not conflict with the unpublished decision in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th Cir).

The opinion in *Quave v. Progress Marine*, 918 F.2d 33 (5th Cir. 1990) does not conflict with the Second Circuit's opinion because pre-judgment interest was awarded, but not a § 914(f) penalty. That is the opposite of the situation here, where no interest was awarded, but the § 914(f) penalty was awarded.

There is no conflict with *Sea-Land Service Inc. v. Barry*, 41 F.3d 903 (3rd Cir. 1994) and *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991) because neither case involved the issue of attorney's fees. There is no conflict with *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971) as there was no issue of attorney's fees for § 914(f) penalty presented.

The Federal Circuit in *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997) did not uphold an award of interest on the late payment of penalty under 33 U.S.C. § 914(f). The question in *Ingalls* was whether payments under 33 U.S.C. § 914(e) was a penalty under federal procurement regulations. There is no discussion of compensation under 33 U.S.C § 928. Other Courts have held the § 914(e) and § 914(f) are penalties.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED DOES NOT MERIT REVIEW.

The question raised by Petitioner does not merit review, nor does Petitioner articulate any "special and important reasons" to support his argument that this Court should exercise its discretionary power of review. Rule 10 of the Supreme Court of the United States implies that there must be a substantial Federal Question presented to warrant the granting of Certiorari. The question presented by Petitioner relates solely to whether the Second Circuit correctly decided that the Petitioner failed to preserve his right to interest by failing to file a cross appeal and he was not entitled to a statutory award of attorney's fees under § 928 because a § 914(f) penalty is not compensation. Further, the Petitioner only received a Section 914(f) Penalty, which does not by itself merit an award of attorney fees.

The decision of the Second Circuit does not conflict with a decision of this Court or of another Federal Circuit Court of Appeals, nor has the Second Circuit decided a Federal Question in a way which conflicts with a state Court of last resort. There is no evidence that the Second Circuit Court of Appeals has "departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court" so as to warrant an exercise of this Court's power of supervision.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties", and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux Memorial Park Cemetery,* 349 U.S. 70 (1955). The Petitioner has failed to demonstrate that any of the reasons set fourth above are present in the instant case. Petitioner is merely dissatisfied with the outcome of the decision as it affects him as a litigant and is now attempting to reargue the issue which was not awarded by the District Court and affirmed by the Circuit Court of Appeals.

II.

NO REASON TO GRANT CERTIORARI REGARDING ISSUE OF INTEREST.

In his Amended Petition with the District Court, the Petitioner requested the 20% penalty, plus interest, costs and attorney's fees, if appropriate. The District Court's judgment was for the sum of $28,000 but did not award interest, costs and attorney's fees. The Petitioner did not file a cross-appeal of the denial of his request for interest.

What a party may not do, absent a cross-appeal, is

> attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

Morley Construction Co. v. Maryland Casualty, Co., 300 U.S. 185, 191 (1937) (Cardozo, J.). The Second Circuit saw no reason to excuse the Petitioner's failure to file a cross-appeal and declined to award fees, costs and interest. The Petitioner has offered no case to support his claim. The Respondent contends that this Court should not exercise its discretionary power of review to award him interest in this case.

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IN THIS CASE.

Petitioner states the Second Circuit's opinion is in conflict with *Hisle v. Louisiana Dock Company*, *supra*. In *Hisle*, the employer failed to pay the compensation order as well as the § 914(f) penalty. The Sixth Circuit calls the § 914(f) "a substantial penalty of twenty percent of the original compensation award" (Petitioners App. 46a). In the case *sub judice*, the compensation award was paid by the employer. The only issue was the § 914(f) penalty which the Respondent contended was not properly awarded. Both the Second Circuit and the Sixth Circuit call § 914(f) a penalty. The Second Circuit found that a § 914(f) penalty was not compensation under 33 U.S.C. § 928. The Sixth Circuit did not discuss that issue. The employee in *Hisle* was entitled to attorney fees to recover unpaid compensation under the ALJ's order.

The Second Circuit's published decision in *Burgo v. General Dynamics*, 122 F.3d 140 (2d Cir. 1997), *reh. den.*, November 17, 1997 is not in conflict with the unpublished decision in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th Cir.). The Sixth Circuit did not believe the decision in *Hisle* merited publication. Under the Sixth Circuit's Local Rule 24(c):

> Citation of unpublished decisions by counsel in briefs and oral arguments in this Court and in the District Courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

The precedential value in the Sixth Circuit of the unpublished *Hisle* is questionable and, certainly, does not rise to a conflict of opinions with the published decision in this case.

The Petitioner's belief that there is a conflict in the opinions in *Sea-Land Service Inc. v. Barry*, 41 F. 3d 903 (3rd Cir. 1994) and *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991) is misplaced. Neither case involved the issue of attorney's fees. The claimed conflict of opinions between *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971) is also factually incorrect. *Strachan* did not involve the issue of attorney's fees for § 914(f) penalties. The Second Circuit Court quotes *Strachan* to support its interpretation that payments under § 914(f) are a penalty.

The Petitioner's claimed conflict with the Circuit Courts' opinion in *Ingalls Shipbuilding Inc. v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997) is also incorrect. The Federal Circuit did not uphold an award of interest on the late payment of a penalty under § 914(f). The issue in *Ingalls op cite* was whether payments made under 33 U.S.C. § 914(e) were penalties under federal procurement regulations. There was no discussion whether the § 914(f) penalty was compensation under the language of 33 U.S.C. § 928. As such, that case does not apply to the instant case.

IV.

OTHER COURTS' OPINIONS SUPPORT THE SECOND CIRCUIT'S OPINION THAT SECTION 914(e) AND 914(f) PAYMENTS ARE PENALTIES.

This Court in *Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529, 534 (1983) refers to both § 914(e) and § 914(f) as penalties. *Ingalls Shipbuilding v. Director* (*Ingalls I*), 898 F.2d 1088, 1095 (5th Cir. 1990) stated

> *III Penalties*
> Section 914(e) of the Act provides that employers are liable for a ten percent penalty for failure to pay a compensation award when due, unless they timely file a notice of controversion or are excused.

See also Ingalls Shipbuilding v. Dir. (Ingalls II), 976 F.2d 934, 938 (5th Cir. 1991); *Newport News Shipbuilding and Dry Dock Co v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *National Steel and Shipbuilding Co v. Bonner*, 600 F.2d 1288, 1294 (9th Cir. 1979); *Strachan Shipping Co v. Wedemeyer*, *supra* at 1228.

Where the language of § 914(f) provides for a 20% payment in addition to the original compensation order, if the payment is only one day late it is not related to compensating the employee for delay or loss of use of wages. Section 914(f) does not distinguish between a payment one day late or one year late; it is still 20% of the compensation order. Clearly, the Second Circuit is correct that this is a penalty and not compensation.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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